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November 15, 2006

Comments on Class II Classification Standards
c/o Penny Coleman
Office of General Counsel
National Indian Gaming Commission
1441 L Street Northwest, Suite 9100
Washington, DC 20005

Via Facsimile & United States Mail
(202) 632-0045

Re: Comments on Proposed Rule Regarding Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using Electronic Computer, or Other Technologic Aids

Published in the Federal Register, Vol. 71, No. 10, On May 25, 2006

Comments Due: November 15, 2006

Dear Ms. Coleman:

The Oneida Nation of Wisconsin (the Nation) through the Oneida Gaming Commission (the OGC) offers the following comments with respect to the NIGC's proposed adoption of rules governing the classification of Class II games using electronic or other technological aids. The proposed regulations generally identify only "25 U.S.C. 2701 et seq." as the statutory authority for the regulations. As is noted more fully in the following, the Nation submits that the proposed rules are unnecessary and unnecessarily restrictive on Tribes that operate gaming, especially in those jurisdictions where states, as a result of the Seminole decision have been relieved of their obligation to negotiate in good faith with Tribes for the operation of Class III gaming. The proposed rules seem to be the NIGC's attempt to legislatively alter the decisions of the various federal district courts that have ruled against the NIGC in litigation regarding the proper definition of Class II games. The Nation believes that the federal court decisions on these matters are sound and the NIGC should not now substitute its decision for that of the federal courts merely because those courts have not agreed with the NIGC.

The Nation supports the effort to authorize Class II machines as an option, consistent with existing law, for all Tribes. The Nation believes that the question as to what is an aid and what is a slot machine needs to be guided by several principles that appear to

have been employed by the federal courts addressing this question. Those principles are as follows:

- IGRA allows the use of aids in Class II gaming, and their used does not alter the fundamental nature of the games as, in fact, Class II;

- The process utilized by the NIGC to draft classifications and standards for technologic aids must include extensive consultation with tribes;

- Any regulations or standards for technologic aids in Class II gaming must incorporate the decisions of federal courts that have upheld the use of technologic aids in Class II gaming;

- Technological advancements create greater opportunity for tribes to fully implement IGRA in jurisdictions that have refused to negotiate Class III compacts and any regulations must be flexible to allow for that opportunity; and

- Class II machines must remain a viable alternative for tribes should the states continue to push their illegal efforts to force revenue sharing from tribes through the tribal/state compacting process.

I. BACKGROUND.

The Nation operates Oneida Bingo and Casino near Green Bay, Wisconsin. The Nation's facilities include Class II and III gaming, food services, hotel services, convention facilities, entertainment venues and other amenities. The Nation established and delegated to the Oneida Gaming Commission (OGC) the authority to regulate gaming on lands that are under the jurisdiction of the Nation pursuant to the Nation's Tribal Gaming Ordinance. The Nation's Gaming Ordinance has been approved by the NIGC. The OGC is the primary regulatory of gaming on the Oneida Reservation, and in that capacity fulfills all of the regulatory functions delegated to it in the ONGO, including ensuring that all gaming conducted on the Oneida Reservation is conducted fairly and in full compliance with applicable Tribal, state and federal laws and regulations.

The Nation operates Class III gaming pursuant to a tribal/state compact entered into between the Nation and the State of Wisconsin on November 8, 1991, and subsequently amended in May 1998 and April, 2003. Despite repeated efforts by citizens of the State to have the Compact amendments declared invalid, thus eliminating the Tribe's ability to conduct Class III gaming, the Compact and subsequent amendments were recently confirmed to be valid by the Supreme Court of the State of Wisconsin. Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (Wis. 2006). Despite this victory, the

Nation is not under the illusion that the threats to its Class III operations will not continue. As a result the ability to fully and fairly engage in all possible forms of Class II games is crucial to the Nations future economic security.

The Indian Gaming Regulatory Act defines generally what constitutes Class II and Class III gaming. Class II gaming consists of "the game of bingo, whether or not electronic, computer, or other technologic aids are used in connection therewith, including, pull-tabs, lotto, punchboards, tip jars, instant bingo, and other games similar to bingo, and various card games so long as they are not house banking games." Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." Electronic or electromechanical facsimiles are specifically included within the definition of Class III gaming, and as a result, permitted only pursuant to a Tribal-State Compact between the operating Tribe and the State in which the Tribal lands are located. See generally, 25 U.S.C. §§2703 (7)(A), (B) and 2703 (8).

On May 25, 2006, the NIGC announced its intention to promulgate regulations relating to Indian gaming facility licensing requirements (the Proposed Rule). According to the NIGC, advances in technology have obscured the line between technologic aids to class II games and class III electronic facsimiles. The NIGC believes that "the future success of Indian gaming under IGRA depends upon tribes, states, and manufacturers being able to recognize when games fall within the ambit of tribal-state compacts and when they do not." The NIGC states that the proposed regulations are an attempt to develop "bright-line classification standards" to distinguish class II games from the class III "slot machines they mimic."

II. THE PROPOSED RULES EITHER FAIL TO CLARIFY THE DISTINCTION BETWEEN CLASS II AND CLASS III GAMING OR ARE DO SO IN AN UNDULY RESTRICTIVE MANNER.

- **Part 502.8: Changes to the definition of Electronic or Electromechanical Facsimile.**

The definition of electronic or electromechanical facsimile was changed, in the words of the NIGC, to make "clear that all games including bingo, lotto and 'other games similar to bingo,' when played in an electronic medium, are facsimiles when they incorporate all of the *fundamental* characteristics of the game" (italics added). The comments further state that bingo, lotto and games similar to bingo are electronic or electromechanical facsimiles if (a) the format of the game includes players playing against the machine, rather than broadening participation among multiple players; (b) the

device incorporates all of the fundamental characteristics of the game electronically; and (c) the device requires no competitive action or decision-making.

In reality, the definition is not all that clear. First, it defines an electronic or electromechanical facsimile as a game that, among other things, incorporates **the** fundamental characteristics of the game. The regulation then attempts to apply the definition of bingo, lotto and other games similar to bingo by saying that such a game is an electronic or electromechanical facsimile if it incorporates **all** the fundamental characteristics of the game. The proposed regulation does not define nor elaborate on what constitutes a "fundamental characteristic," leaving the definition less than clear. Moreover, the proposed regulation requires a bingo, lotto or other game similar to bingo to incorporate **all** of the fundamental characteristics, begging the question whether a game that incorporates 99% of the *fundamental* characteristics constitutes a class II or class III game. The standards contained in new part 546 fail to create "bright line" distinctions. In fact, the comments to that part appear to use the term "fundamental" rather loosely.[1] All in all, if the goal is to achieve a "bright line distinction" between class II and class III electronic devices, this definition does not achieve that goal and in fact beg questions that will undoubtedly lead to continued litigation in this area.

- **Part 546: Classification Standards for Bingo, Lotto. Other Games Similar to Bingo, Pull-tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using Electronic, Computer or other Technologic Aids.**

The proposed classification standards are based upon the three statutory criteria for bingo contained in the IGRA. Those criteria define bingo as a game:

(1) Which is played for prizes, including monetary prizes, with cards bearing number or other designations;
(2) In which the holder of the card covers such numbers or other designations when objects, similarly numbered or designated are drawn or electronically determined; and
(3) In which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards

25 U.S.C. 2703(7)(A).

[1] The comments refer to the statutory criteria for bingo as the "fundamental principles" on which a class II classification is based. In addition, the comments also refer to certain game components that "fundamentally change or distort the nature of the game" so that it becomes a class III game.

(1) The game of bingo (see, Part 546.03).

The proposed regulation contains a definition of a game of bingo that is, in most respects, nearly identical to that contained in the IGRA. The comments to the proposed regulation break the definition down into "two essential" elements, cards and prizes. For games played through an electronic medium, the device must display in at least two inch lettering: "THIS IS A GAME OF BINGO" or "THIS IS A GAME SIMILAR TO BINGO."

Cards

The proposed regulation requires bingo to be played with cards. The comments indicate that the NIGC **now** believes Congress envisioned the use of a traditional bingo card when it drafted the sections on class II bingo. It is not clear on what the NIGC relies in reaching this new belief, but the proposed regulation appears to be narrower than the NIGC's previous rulings as well as more restrictive than the relevant federal court decisions governing the use of electronic devices in class II gaming.

Under the proposed regulation, the cards need not be paper as in traditional bingo, but if electronic, the cards must be (a) in the possession of the player before the numbers are drawn; (b) not subject to change once the numbers are drawn; (c) clearly visible to the player on the screen;[2] and perhaps most significantly, (d) arranged in a traditional bingo card format with a grid of 25 spaces in 5 rows of 5.

The proposed regulation is more restrictive than the court decisions interpreting what constitutes an electronic aid to a class II game. See, e.g. U.S. v. 103 MegaMania Gambling Devices, 223 F. 3d 1091 (9th Cir. 2000). At a minimum, the proposed regulation should permit those games that were permitted previously by NIGC rulings or permitted by decisions of the federal courts. This could be done by amending the proposed language to accommodate those types of games or creating a grandfather provision for the continued operation of those games, to do otherwise will significantly disrupt the business decisions and planning that Tribes have undertaken based on the proper assumption that questions regarding the affected games were settled by the federal litigation, which may engender further litigation.

[2] Clearly visible appears to mean that the card is at least the size of one half the available space on the screen. If multiple cards are in use by the player, the device must be able to display all of the cards in play. If only one card is shown during play, it must be the card closest to a bingo win or the card with the highest value prize.

Prizes

The prizes in a bingo game must be established before the game begins and must have a meaningful value as compared to the entry fee for the game. The game winning prize need not be the highest prize in the game but, the game winning prize must be "at least 20% of the amount wagered and one cent." Each player must have an equal chance of winning any pattern and the probability of winning may not vary based on the amount wagered. Prizes must be fixed or established by formula. Variable prizes are not permitted. Wagering levels are permitted provided all players in the game are eligible to compete for all winning patterns. Prizes may not be based on an event not directly related to the bingo play (i.e. a spinning reel with eligibility determined by covering a specific bingo pattern or "mystery jackpots").

Because bingo is won by the first player covering the predesignated winning pattern, play must stop or pause when the winning number is released so that the winning player can cover the pattern, "announce" the bingo and claim the prize. This is actually contrary to traditional bingo and undermines the competitive nature of the game. If a goal of electronics is to "broaden participation among competing players," there should be no greater pause for a potential "winning" number that for any other number selected in the game.

(2) Games similar to Bingo.

Previously, the NIGC attempted to differentiate bingo from games similar to bingo by whether a game is house-banked. These proposed regulations remove that distinction and instead create a more restrictive definition that requires that a game similar to bingo actually meet the definition of bingo, subject to a few "variants". The comments to Part 546 discuss the limited "variants" of bingo that would constitute a game similar to bingo. In short, the variants might be the type of card, or the number of balls released or the sequence. In all other respects, the game must be played like bingo and meet all the statutory requirements for bingo.[3] The proposed regulation also sets limits on the variants. For example, a non-traditional card must have at least three spaces (in addition to the free space) and the quantity of numbers released must exceed the number of spaces. Cards containing pre-covered numbers are not permitted.

[3] In the comments, the NICG observes: "We conclude that there are characteristics of bingo that are so critical that games lacking them cannot even be said to be a variant or bingo-like.

This proposed regulation appears to go beyond the language of the IGRA by essentially restricting games *similar* to bingo to bingo. The variants proposed by the NIGC are so minimal that there is really no meaningful distinction between bingo and games similar to bingo.

The NIGC also continues its ill-conceived opposition to games with pre-covered numbers. These games, commonly referred to as Bonanza or Bonanza-style games, are considered bingo in a live setting, both in Indian country as well as in virtually every charitable bingo game in the country. It seems illogical that a game with pre-covered numbers is bingo if played live, but not bingo (or a game similar to bingo) if played electronically in an identical format.

(3) The Play of the Game of Bingo or Games similar to Bingo (see, Part 546.4-6).

Numbers or other designations selected in a game must be from a finite or non-replaceable pool. A common draw may be used for games played simultaneously. The proposed regulations require that numbers are selected in "real time", with a minimum 2 second interval between the selections. In the initial publication of the proposed regulations, the comments indicated that the interval can be shortened if all players "daub" within a shorter interval of time. This exception was deleted in a subsequent publication on August 4, 2006. This is unfortunate. The requirement of a two-second pause is detrimental to the play of a game, making it less attractive to the players and ultimately, less profitable to the tribal operator. It is also unnecessary to the play of the game, given that no player needs to examine their card or cards prior to daubing a number. Any device with a daub feature will have a button or touch screen that will daub all cards with the selected number. Two seconds is not needed to make the daub. At a minimum, the proposed regulation should be amendment to *include* the exception that was stricken in the August 4, 2006 federal register publication so that if all players daub within the two second limit, play may resume.

A player wins the game by being the first person to cover the pre-designated game winning pattern. A game may not end until the game winning pattern is achieved. A player may "sleep" a winning pattern by not daubing within the 2 second interval. Numbers that have been slept must be marked and displayed by the device and the player must be given the opportunity to catch up and win if he or she is the first to daub a winning pattern. Like the provision requiring a pause when a potential winning number is selected, this provision on sleeping a bingo is contrary to the competitive nature of the game. Traditional bingo does not permit a player to "catch up", nor does traditional bingo notify the player of a slept number or slept bingo. This requirement should be deleted.

III. THE PROPOSED RULE IMPERMISSIBLY INFRINGES ON THE NATIONS SOVEREIGN RIGHTS AS THE PRINCIPAL RETULATORY OF GAMING ON ITS RESERVATION.

The legislative history to the IGRA confirms what is obvious from the face of the statute: the NIGC was delegated only limited, oversight authority, not the expansive authority to promulgate regulations that would, in essence, federalize a tribe's retained inherent authority to enact and enforce its own laws on its reservation free from interference from state or federal governments. The Senate Committee Report on S.555, the bill that became the IGRA, clearly identifies Congress' intent that the NIGC have a limited, oversight role in Class II gaming and virtually no authority in the area of Class III regulatory and jurisdictional matters, which were delegated to states and tribes in the compacting process --

> S.555 recognizes the primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For Class III casino, pari-mutuel and slot machine gaming, the bill authorizes tribal governments and state governments to enter into tribal –state compacts to address regulatory and jurisdictional issues

S.Rep.No. 446, 100th Cong., 2nd Sess. 3 (1988). At page 7 of the same Senate Report, the Committee reiterates the oversight role of the NIGC –

> Class II continues to be within tribal jurisdiction but will be subject to oversight regulations by the National Indian Gaming Commission..."

Id.

The comments of Senator Inouye, the Senate manager of S.555, succinctly and unequivocally state the intention of Congress that retained tribal rights of self-government and self-determination were not to be affected by the IGRA:

> [T]he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in reserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian Lands.

134 Cong.Rec. S12649 (Sept. 15, 1988). Senator Inouye's statement is echoed in the statement of Senator Evans:

> The inherent sovereign rights of the Indian tribes were reserved by the tribe for the fullest and unencumbered benefit of the Indian people. These rights have been recognized time and time again by the highest courts of our Nation, and they continue in existence except in rare instances where the Congress has exercised its power to restrict them. When this body has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogation of tribal rights must have been done expressly and unambiguously.
>
> Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construes. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision.

134 Cong.Rec. S12654 (Sept. 15, 1988).

A delegation of authority that would permit the NIGC to control the determination of what is a Class II game and to control the laboratories that are authorized to make those "independent" determinations is not what the IGRA was meant to achieve and would constitute a substantial intrusion into the Tribe's right to self-governance. Oversight cannot possibly be interpreted to include the determination of the nature of the game itself. That is the essence of substantive and primary control, not oversight. There simply is no statutory authority for the NIGC to interject itself in the self-governance of an Indian tribe in the intrusive manner that is contemplated by the Propose Rule. The Commission respectfully suggests that the NIGC should withdraw the Propose Rule and re-evaluate its authority to act in the area of environmental, health and safety matters. In the event the NIGC determines that such regulation is needed from the federal government, it must ask Congress to delegate to it the authority to act.

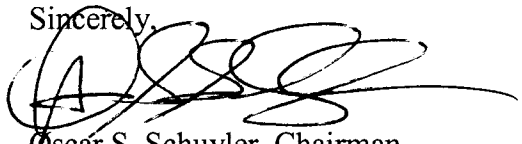
Although the comments to the proposed regulations indicate that a Tribe's gaming regulatory authority is the entity authorizing specific games at the Tribe's gaming facility, certification of a game as "class II" must be made by an independent gaming test laboratory "recognized" by the NIGC, and the Chairman of the NIGC may object to the certifying laboratory report. In reality, the NICG has preempted tribal authority for class II gaming classifications by giving itself ultimate control over the labs eligible to make certification decisions.

According to the proposed regulation, the NIGC will only recognize laboratories that demonstrate integrity, independence and financial stability and that pass an onsite review by the NIGC. Provisional recognition may be extended. After initial recognition, a lab must be capable of demonstrating its continued level of technical skill through a Key Performance Indicator analysis, which will include an evaluation of the accuracy of the lab's class II classifications and reports of serious classification or technical faults. This last criterion is significant because it means that the NIGC can "de-certify" a lab that does not issue classification opinions consistent with the view of the NIGC, thereby essentially negating any opportunity for differing views and eliminating any notion of independence in classification decisions.

IV. CONCLUSION AND RECOMMENDATION.

The Oneida Nation recommends that the NIGC withdraw the Proposed Rule because it is unnecessary, does not achieve the clarity that the NIGC believes is necessary in this area and is sure to engender litigation. The Nation thanks the NIGC for the opportunity to submit these comments.

Sincerely,



Oscar S. Schuyler, Chairman
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